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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CALIFORNIA HOUSING FINANCE AGENCY, Plaintiff and Appellant, v. HANOVER/CALIFORNIA MANAGEMENT AND ACCOUNTING CENTER, INC., et al., Defendants and Appellants.	G034968 (Super. Ct. No. 02CC10634) O P I N I O N

Appeal from a judgment and orders of the Superior Court of Orange County, Robert H. Gallivan, Judge. Affirmed.

Bergman & Dacey, Gregory M. Bergman, Robert M. Mason III and Matthew R. Hicks for Defendants and Appellants.

O'Melveny & Meyers, Paul B. Salvaty, Richard W. Buckner, Kristina M. Hersey; and Thomas C. Hughes for Plaintiff and Appellants.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II.B, II.C, II.D.2, II.D.3, II.E, II.F, and II.G.

California Housing Finance Agency (CHFA) sued John G. Schienle, Robert L. McWhirk,[1] and Hanover/California Management and Accounting Center, Inc. (HC), for various torts including fraud, negligent misrepresentation and breach of fiduciary duty. CHFA also accused Schienle and McWhirk of having a financial interest in a government contract they made while in their official capacity as CHFA employees, a violation of Government Code section 1090 (all statutory references are to the Government Code, unless otherwise noted). A jury found for CHFA, awarding it compensatory and punitive damages against each defendant. The trial court awarded CHFA prejudgment interest and attorney fees.

Defendants contend the trial court should have granted their summary judgment motion because all of plaintiff's claims were time-barred. Defendants also complain the trial court improperly instructed the jury (a) on the discovery rule for statutes of limitations, (b) on liability under section 1090, and (c) that McWhirk owed CHFA fiduciary duties as a matter of law. Defendants further contend CHFA's attorney fee motion should have been denied because it was untimely, based on a void contract, and sought fees for noncompensable work. Finally, defendants argue CHFA's motion for prejudgment interest should have been denied because it was untimely and sought a double recovery.

We reject each of defendants' contentions. In the published portion of the opinion, we conclude any potential error in denying defendants' summary judgment motion was harmless because all factual disputes were fully and fairly litigated at trial. We also conclude the trial court did not err in instructing the jury liability may attach under section 1090 for a person designated an independent contractor. In the unpublished portion of the opinion, we conclude the trial court correctly instructed the jury on the

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[1] McWhirk was sued both as an individual and as Robert L. McWhirk, a professional corporation.

limitations defense, and defendants' failure to offer clarifying instructions for any perceived instructional ambiguity forecloses further consideration of the issue. The trial court properly rejected defendants' contention that civil liability under section 1090 requires the jury to find defendants acted "knowingly." Defendants' argument that McWhirk, CHFA's attorney, did not owe CHFA fiduciary duties is patently meritless, and the trial court correctly instructed the jury that McWhirk was CHFA's fiduciary. CHFA timely filed its attorney fee motion, and sought only compensable fees based on its contract. Finally, we conclude CHFA timely requested prejudgment interest, and the award did not constitute a double recovery. Accordingly, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

CHFA is a component unit of the State of California, created under the Zenovich-Montrose-Chicon Housing and Home Finance Act, codified as Health and Safety Code section 50000 et seq. CHFA's mission is to provide affordable housing in the state. (See Health & Saf. Code, § 50003.) To accomplish this, CHFA acts as direct lender, loan purchaser, and mortgage insurer of both its own loans and those of other lenders. (See Health & Saf. Code, §§ 50000, 51611.) CHFA's mortgage insurance programs are conducted with funds held in the California Housing Loan Insurance Fund (Insurance Fund) under Health and Safety Code section 51611.

Schienle served as CHFA's director of insurance from 1986 through 2001, reporting directly to CHFA's highest officer, the executive director. McWhirk served as CHFA's general counsel from 1984 until 1990. From 1991 though 2000, McWhirk became CHFA's outside counsel under a series of written agreements.

During the first half of Schienle's tenure, the Insurance Fund collected mortgage insurance premiums exclusively on an annual basis. In 1994 or 1995, Schienle took steps to have the Insurance Fund offer mortgage insurance programs in which the

lenders and loan servicers could pay premiums monthly. In late 1995 and early 1996, Schienle and McWhirk created HC to provide CHFA insurance premium processing services. McWhirk incorporated HC, acted as its legal counsel, and served as president and chief executive officer during the time he also served as CHFA's outside counsel. McWhirk operated HC from his residence, and arranged for his domestic partner, Michael Misita — who had no mortgage insurance or accounting experience — to manage its day-to-day activities. To hide their interest in HC, Schienle and McWhirk brought in Roger Formisano to pose as HC's sole owner, promising Formisano $100,000 if he would participate in the scheme. Formisano never owned any interest in HC, but held the company's stock for McWhirk and Misita with directions to relinquish the stock to them when McWhirk no longer represented CHFA.

In early 1996, Schienle and McWhirk influenced CHFA to enter into a contract with HC (HC contract), whereby HC would collect monthly premiums from lenders and loan servicers and forward the premiums to CHFA, after deducting HC's "operating costs." Schienle drafted the HC contract, which was the only agreement he drafted during his CHFA tenure. The agreement failed to describe HC's services, continued in perpetuity with no termination date, included no audit provisions, and failed to define the amount of HC's compensation. Neither Schienle nor McWhirk ever disclosed their interest in HC to anyone at CHFA.

Under the HC contract, the amount deducted from the premiums for operating costs increased dramatically after four years into the policy period, and after year five, HC could keep all of the premiums it collected. In other words, after five years into any particular policy HC would cease remitting to CHFA any part of the premiums it collected, even though CHFA would continue to provide mortgage insurance. In 1996, the first year of operation, HC collected approximately $59,000 in premiums, kept $35,000, and forwarded $24,000 to CHFA. During the last two and one-half years of

operation, from 2000 through the first six months of 2002, HC skimmed approximately $6 million from the premiums it received.

As the volume of HC's business grew, defendants hired Misita's nephew and McWhirk's sister to assist in processing the insurance premiums. In 1999, HC paid Formisano the $100,000 initially promised. At the end of 2000, McWhirk ceased acting as CHFA's outside counsel. In early 2001, Formisano surrendered his stock to HC without receiving further consideration, and HC reissued stock to McWhirk and Misita, making them the sole owners of the company. During the scheme, HC paid McWhirk substantial legal fees, leased space in his residence, and paid numerous personal expenses, including the lease on a new Mercedes automobile. HC funds were also used to fund two other companies, Stars and Stripes (California) and Stars and Stripes (Nevada), also owned by McWhirk and Misita. Schienle served as an officer and director in both Stars and Stripes companies, and received substantial financial benefits from them and through HC.

Schienle retired from CHFA in December 2001. Shortly thereafter, Schienle's replacement discovered the HC contract in a stack of papers Schienle had left behind. Concerned about the agreement, CHFA launched an investigation into the contract and HC. After hiring the accounting firm of PriceWaterhouseCoopers, CHFA discovered Schienle and McWhirk's involvement in the matter, and terminated the HC contract. On June 14, 2002, CHFA filed suit against Schienle, McWhirk, and HC. CHFA's third amended complaint sought damages for fraud; negligent misrepresentation; breach of fiduciary duty; violation of section 1090; legal malpractice; negligence; and breach of contract. The complaint also sought a declaration that the HC contract was void; restitution and injunctive relief based on Business and Professions Code section 17200 et seq; and an accounting. HC filed a cross-complaint against CHFA for breach of the HC contract.

Defendants moved for summary judgment, arguing that CHFA's action was barred under the applicable statutes of limitations. The court denied the motion, finding a triable issue of fact on whether defendants fraudulently concealed the facts upon which the causes of action were based, and on whether CHFA should have known about defendants' wrongdoing more than three years before it filed the action. McWhirk also filed a separate summary adjudication motion asserting he owed no duty to CHFA because he acted as an independent contractor for the Insurance Fund. The court denied the motion, finding a triable issue of fact on whether McWhirk was CHFA's fiduciary.

Following a seven-week trial, the jury returned its verdict finding (a) each defendant liable for fraud and negligent misrepresentation; (b) Schienle and McWhirk liable for breach of fiduciary duty and violation of section 1090; and (c) McWhirk liable for legal malpractice and breach of contract. The jury awarded CHFA compensatory damages of $6,744,602 and $375,000 in punitive damages against each defendant, and awarded prejudgment interest from the date the action was filed. The jury found in CHFA's favor on HC's cross-complaint. Following the jury verdict, the trial court determined that defendants violated Business and Professions Code section 17200 et seq., and ordered restitution in the amount of $6,744,602. Following the verdict, the trial court awarded prejudgment interest of $1,149,903.72 on CHFA's tort claims against all defendants, and an additional $492,817.15 against McWhirk based on CHFA's contract claims.

II

DISCUSSION

A. *Defendants May Not Challenge the Denial of Their Summary Judgment Motion Because the Parties Litigated the Same Issues at Trial*

Defendants contend the trial court erred when it denied their summary judgment motion, which sought dismissal of CHFA's claims based on statutes of

limitations. CHFA contends that orders denying summary judgment based on triable issues of fact are not reviewable as a matter of law after a full trial covering the same issues. We agree with CHFA.

In *Waller v. TDJ, Inc.* (1993) 12 Cal.App.4th 830 (*Waller*), the trial court denied the defendants' summary judgment motion. A jury later decided the same issues at trial in the plaintiff's favor. The Court of Appeal declined to review the summary judgment denial, reasoning that the defendants suffered no prejudice because they received a jury trial on the merits. (*Id.* at p. 836.) *Waller* explained: "When the trial court commits error in ruling on matters relating to pleadings, procedures, or other preliminary matters, reversal can generally be predicated thereon only if the appellant can show resulting prejudice, and the probability of a more favorable outcome, *at trial*. [California Constitution] Article VI, section 13, admonishes us that error may lead to reversal only if we are persuaded 'upon an examination of the entire cause' that there has been a miscarriage of justice. In other words, we are not to look to the particular ruling complained of in isolation, but rather must consider the full record in deciding whether a judgment should be set aside. Since we are enjoined to presume that the trial itself was fair and that the verdict in plaintiffs' favor was supported by the evidence, we cannot find that an erroneous pretrial ruling based on declarations and exhibits renders the ultimate result unjust." (*Id.* at p. 833.)

Defendants rely on the recent case of *Gackstetter v. Frawley* (2006) 135 Cal.App.4th 1257 (*Gackstetter*), which distinguished *Waller.* In *Gackstetter*, the defendants unsuccessfully raised a defense of good faith settlement under Code of Civil Procedure section 877.6 in their summary judgment motion. On appeal, defendants argued the trial court erred in denying its summary judgment motion. *Gackstetter* accepted *Waller's* conclusion that a reviewing court will not consider whether a trial court erred in denying a summary judgment motion based on triable issues of fact following a full trial of those same issues. (*Gackstetter,* at p. 1268.) The court explained:

"'A decision based on less evidence (i.e., the evidence presented on the summary judgment motion) should not prevail over a decision based on more evidence (i.e., the evidence presented at trial).'" (*Id.* at p. 1269, citing Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (2004) ¶ 8:168.10, p. 8-114.) *Gackstetter* nonetheless reviewed the trial court's denial of summary judgment because the good faith issue was not based on disputed facts which were resolved at a subsequent trial. The court recognized the good faith settlement issue could have been raised in a number of different ways, and defendants had not forfeited review merely because they chose summary judgment as the procedural device to assert their good faith settlement defense. (*Gackstetter*, at p. 1269.)

Defendants also cite *Sturm, Ruger & Co. v. Superior Court* (1985) 164 Cal.App.3d 579 and *Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077 (*Coy*) to support the notion that a reviewing court could consider whether the trial court erred in denying summary judgment despite a full trial on the same issues. *Sturm* does not support defendants' argument. There, the trial court simply recognized that a party's failure to timely seek writ review of an order denying summary judgment did not prevent that party from raising the same issues at trial, or from appealing the resulting judgment. (*Sturm*, at p. 582.) Nothing in *Sturm* suggested the moving party could obtain reversal based on the trial court's erroneous summary judgment denial where the same issue was adversely decided against the moving party following a fair trial.

Coy, supra, 235 Cal.App.3d 1077 reversed a judgment following a jury trial based on the trial court's erroneous summary judgment denial. But there, the court expressly noted the plaintiff had not contested the defendant's ability to challenge the pretrial summary judgment ruling on appeal after trial. (*Id.* at p. 1082, fn. 2.) Because the issue was never addressed, *Coy* offers no support for defendants' argument. (See *People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10 ["It is axiomatic that cases are not authority for propositions not considered"].)

Here, the trial court denied defendants' summary judgment motion because it found triable issues of fact whether defendants fraudulently concealed facts upon which the causes of action were based, and whether CHFA should have known about defendants' wrongdoing more than three years before it filed the action. These factual issues were fully litigated at trial and determined adversely to defendants. For that reason, no miscarriage of justice occurred when the trial court denied defendants' summary judgment motion.

B. *The Trial Court Did Not Err in Instructing the Jury That McWhirk Owed Fiduciary Duties to CHFA*

The trial court instructed the jury that each defendant owed CHFA fiduciary duties. The court's instruction affected the statute of limitations discovery rule, rendered McWhirk potentially liable for breach of fiduciary duty, and prevented McWhirk from asserting CHFA's negligence as a defense to its fraudulent concealment claim. McWhirk contends the trial court erred in removing these issues from the jury's consideration because they constituted disputed factual issues only a jury could resolve. Specifically, he argues he should have been allowed to present evidence to the jury that he was outside counsel to the Insurance Fund only, and did not represent CHFA itself. He also claims the evidence would demonstrate he acted as an independent contractor, rather than a fiduciary.

"An issue of fact cannot be taken from a jury by the trial court and treated as an issue of law unless only one conclusion is legally deducible and any other conclusion cannot command the support of the substantial evidence that will survive appellate review." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 433.) McWhirk cites the annual legal services contracts to support his argument that he represented the Insurance Fund, not CHFA. A review of these contracts, however, conclusively refutes McWhirk's contentions. During the time the

alleged fraudulent activity occurred — commencing in 1994 — McWhirk's annual legal services contracts were with "the California Housing Finance Agency, a political subdivision of the State of California, doing business as the California Housing Loan Insurance Fund . . . ."

As we have observed previously, "[u]se of a fictitious business name does not create a separate legal entity. . . . '"The designation [DBA] means 'doing business as' but is merely descriptive of the person or corporation who does business under some other name. *Doing business under another name does not create an entity distinct from the person operating the business.*" [Citation.] The business name is a fiction, and so too is any implication that the business is a legal entity separate from its owner.'" (*Pinkerton's, Inc. v. Superior Court* (1996) 49 Cal.App.4th 1342, 1348, original italics.)

Thus, McWhirk's client in each legal services contract from 1994 forward was CHFA itself, and the contract's reference to the Insurance Fund as CHFA's "dba" was of no legal moment. Where there is no ambiguity, the court has the responsibility to interpret the legal effect of a contract. (See *Culligan v. State Compensation Ins. Fund* (2000) 81 Cal.App.4th 429, 434 ["'The interpretation of a written instrument . . . is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect'"].) Because the legal services contracts unambiguously required McWhirk to provide legal services to CHFA, the trial court did not err by instructing the jury McWhirk owed CHFA fiduciary duties.

McWhirk's argument that his putative status as an independent contractor negated any role as a fiduciary is patently frivolous. "An attorney is a fiduciary of the 'very highest character.' [Citation.] By the very nature of the relationship, an attorney owes the client a duty to act with the highest good faith." (*Howard v. Babcock* (1993) 6 Cal.4th 409, 431.) Whether an attorney serves as an employee of the client, as general

counsel, or works as an independent contractor, i.e., outside counsel, the attorney owes the client fiduciary duties as a matter of law.

C. *The Trial Court Did Not Err in Giving the Statute of Limitations Special Instruction No. 7*

1. The Challenged Instruction Accurately States the General Discovery Rule for Statutes of Limitations

Defendants challenge the trial court's use of Special Instruction No. 7 concerning their statute of limitations defense. Defendants argue that their special instructions, which matched the limitations period to each cause of action, should have been used in place of Special Instruction No. 7, which directed the jury to apply a three-year limitations period to all causes of action. Defendants objected to Instruction No. 7 during trial, but only in general terms, and failed to raise the specific matters they now assert on appeal. CHFA contends defendants therefore waived their present objections.

As a general rule, "[a] party may . . . challenge on appeal an erroneous instruction without objecting at trial." (*Lund v. San Joaquin Valley Railroad* (2003) 31 Cal.4th 1, 7.) Thus, a party may contend on appeal for the first time that an instruction inaccurately states the law or conveys irrelevant prejudicial information. (*Ibid.*) On the other hand, "[w]here . . . 'the court gives an instruction correct in law, but the party complains that it is too general, lacks clarity, or is incomplete, he must request *the additional or qualifying instruction in order to have the error reviewed*.'" (*Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 520-521 (*Gregory*).) Accordingly, the question whether defendants waived their right to object to Special Instruction No. 7 turns on the nature of the objections being raised.

Defendants specifically challenge the following language in the instruction: "When a defendant is guilty of having fraudulently concealed the facts on which a cause of action depends, the statute of limitations is tolled until after the plaintiff discovers or

ought to have discovered these facts. [¶] If you find that plaintiff discovered facts constituting the fraud after June 14, 1999, then you shall find that this action was commenced within the statute of limitations and the statute of limitations defense does not apply." We conclude the challenged portion of the instruction accurately states the law. As the court in *Hernandez v. Garcetti* (1998) 68 Cal.App.4th 675, 680-681 observed: "When a defendant fraudulently conceals the facts on which a cause of action depends, the statute of limitations is tolled until the plaintiff discovers or ought to have discovered those facts." The challenged instruction accurately reflects this principle.

Defendants argue the instruction also should have provided that CHFA had a duty to investigate when it received facts that would arouse suspicion in a reasonably prudent person, and that it should be charged with the knowledge a reasonably diligent investigation would uncover. Defendants rely on *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93 (*Sanchez*), for the general principle that "'when the plaintiff has notice or information of circumstances to put a reasonable person *on inquiry*, or *has the opportunity to obtain knowledge* from sources open to his investigation . . . the statute commences to run.'" (*Id.* at p. 101.) But a different analysis applies where a fiduciary relationship continues. *Sanchez* explains, "that during the continuance of [a] professional relationship, which is fiduciary in nature, the degree of diligence required of a [plaintiff] in ferreting out and learning of the negligent causes of his condition is diminished." (*Id.* at p. 102.) Although *Sanchez* was a medical malpractice case, the court noted this principle applies to other fiduciary relationships. (*Ibid.*) In *Brown v. Bleiberg* (1982) 32 Cal.3d 426, the court explained that diminished duty of diligence applies because the plaintiff is entitled to a presumption of reliance on the fiduciary. Consequently, the "tolling effect of nondisclosure or concealment will . . . continue absent unusual circumstances which should put the patient on notice thereof." (*Id.* at p. 438, fn. 9.)

Snapp & Associates Ins. Services, Inc. v. Robertson (2002) 96 Cal.App.4th 884 aptly summarized the fraudulent concealment principle: "'The

doctrine of fraudulent concealment, which is judicially created [citations], limits the typical statute of limitations. "[T]he defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations . . . ." [Citations.] In articulating the doctrine, the courts have had as their purpose to disarm a defendant who, by his own deception, has caused a claim to become stale and a plaintiff dilatory. [Citations.]'" (*Id.* at p. 890.) *Snapp* cautioned, however, that no matter what lengths a defendant goes to in concealing a claim, a plaintiff still has a duty to investigate under certain circumstances. (*Id.* at pp. 890-891.) Thus, the court concluded that the statute of limitations will commence when the plaintiff obtains a "*suspicion* of wrongdoing, coupled with a knowledge of the harm and its cause . . . ." (*Ibid.*)

The foregoing authorities are consistent with Special Instruction No. 7's admonition that "the statute of limitations is tolled until after the plaintiff discovers or ought to have discovered" facts underlying CHFA's claims. Rather than contradicting the challenged instruction, the authorities merely provide further definition and refinement of the phrase "ought to have discovered." Thus, defendants' true complaint with the court's instruction is not that it is an incorrect statement of the law, but that "'it is too general, lacks clarity, [and] is incomplete . . . .'" (See *Gregory, supra,* 80 Cal.App.4th at pp. 520-521.) Because it is defendants' obligation to cure any ambiguity in an otherwise accurate instruction and defendants' objection to Special Instruction No. 7 failed to address the issue now raised, the point has been waived.

2. Substantial Evidence Supported the Trial Court's Instruction on the "Last Overt Act"

Defendants also challenge Special Instruction No. 7 because it articulated the "last overt act" doctrine, as follows: "If you find that the parties engaged in a civil conspiracy you must determine when the parties engaged in the 'last overt act' in furtherance of the conspiracy has been completed. If you find that the 'last overt act'

occurred after June 14, 1999, then you shall find that this action was commenced within the statute of limitations and the statute of limitations defense does not apply." Defendants contend the evidence at trial demonstrated as a matter of law that their last overt act in furtherance of the conspiracy was the creation of the HC contract in 1996. We disagree.

Defendants principally rely on *People v. Zamora* (1976) 18 Cal.3d 538, 560 (*Zamora*), which involved a scheme to burn a building and collect the insurance proceeds. There, the defendants appealed their convictions for conspiracy to commit arson, conspiracy to burn insured property with intent to defraud the insurer, and conspiracy to commit grand theft, contending the claims were time-barred because the last overt act of the conspiracies occurred over three years before their indictment.

Agreeing with the defendants, the Supreme Court in *Zamora* recognized that "'an overt act is an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime.'" (*Zamora, supra,* 18 Cal.3d at p. 549, fn. 8.) Because an overt act is directed toward commission of the crime, the court explained that "acts committed by conspirators subsequent to the completion of the crime which is the primary object of a conspiracy cannot be deemed to be overt acts in furtherance of that conspiracy. Consequently, upon successful attainment of the substantive offense which is the primary object of the conspiracy, the period of the statute of limitations for the conspiracy begins to run at the same time as for the substantive offense itself." (*Id.* at p. 560.) The Supreme Court acknowledged the crimes of conspiracy to commit arson and conspiracy to burn insured property were completed when the building was burned, and that any acts of concealment after that did not lengthen the statutory period. Similarly, the court concluded the conspiracy to commit grand theft was not completed until the defendants received the last insurance payment. (*Id.* at p. 560.)

Zamora does not aid defendants. True, the HC contract which facilitated the scheme was executed in 1996. But the primary object of the conspiracy was not the formation of the contract, but to skim mortgage insurance premiums due CHFA. Accordingly, the conspiracy was not completed until defendants received the last insurance premium. Substantial evidence demonstrated the defendants received insurance premiums under the scheme from mid-1996 until the first half of 2002. Because the complaint was filed in June 2002, the trial court correctly instructed the jury on the "last overt act" principle.

D. *The Trial Court Properly Instructed the Jury on Section 1090*

1. The Trial Court Did Not Err in Instructing the Jury that Section 1090 May Apply to Independent Contractors

Section 1090 provides, in relevant part: "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity." The trial court instructed the jury that "[t]he 'officer or employee' language of Section 1090 must be interpreted broadly. The fact that someone is designated an independent contractor is not determinative; the statute applies to independent contractors who perform a public function." Defendants contend the trial court erred in giving this instruction because section 1090 applies only to a public agency's "officers or employees," and therefore could not apply to McWhirk, an independent contractor. We disagree.

The common law distinction between an employee and independent contractor developed as the courts attempted to establish the parameters for imposing tort liability on the master for the acts of the servant. The Supreme Court in *Boswell v. Laird*

(Cal. 1857) 8 Cal. 469, 489 explained: "The responsibility is placed where the power exists. Having power to control, the superior or master is bound to exercise it to the prevention of injuries to third parties, or he will be held liable."

The common law, however, does not always govern a reference to employment in a particular statute. (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351.) Rather, employment "must be construed with particular reference to the 'history and fundamental purposes' of the statute. (*Ibid*) In contrast to the common law, section 1090 is not concerned with holding a public entity liable for harm to third parties based on its agent's acts. Rather, it places responsibility for acts of self-dealing *on the public servant* where he or she exercises sufficient control *over the public entity*, i.e., where the agent is in a position to contract in his or her "official capacity." Thus, the common-law employee/independent contractor analysis is not helpful in construing the term "employee" in section 1090.

Section 1090, like all conflict of interest statutes, "cannot be given a narrow and technical interpretation that would limit [its] scope and defeat the legislative purpose." (*People v. Honig* (1996) 48 Cal.App.4th 289, 314 (*Honig*).) Thus, in *Honig*, the court construed the "financially interested" element in section 1090 to include not only financial benefits the official personally received, but also those accruing to a nonprofit organization employing the official's spouse. Similarly, in *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569, the California Supreme Court interpreted section 1090's imposition of liability for "any contract made" by financially interested officials to cover preliminary matters, such as "negotiations, discussions, reasoning, [and] planning." (*Ibid*; see also *Thomson v. Call* (1985) 38 Cal.3d 633, 644-645 (*Thomson*) [successive, related agreements considered a single "contract" under section 1090].) The court explained that applying the general rule that a contract is not "made" until the parties mutually agree would frustrate section 1090's purposes. Accordingly, in construing section 1090 in any particular situation, "[w]e must disregard the technical relationship of

the parties and look behind the veil which enshrouds their activities in order to discern the vital facts. [Citation.] . . .'" (*Honig,* at p. 315.)

Courts have recognized that liability under section 1090 may apply to an outside attorney in a position of influence over the public agency. For example, in *People v. Gnass* (2002) 101 Cal.App.4th 1271 (*Gnass*), the defendant was a partner in a private law firm acting as city attorney under a contract which paid the firm a monthly retainer based on a set number of hours per month, and an hourly rate thereafter. (*Id.* at p. 1279.) The city and its redevelopment agency formed a public financing authority, for which the defendant also acted as counsel. The public financing authority then joined with other local public agencies to form a number of joint power authorities which issued a series of bonds. The defendant earned fees from the bond issues either for services rendered as disclosure counsel or for services rendered to another attorney who acted as disclosure counsel. The Court of Appeal determined the grand jury had probable cause to believe defendant violated section 1090 based on the fees earned in connection with the bond issues. (*Id.* at pp. 1278-1279.) The court recognized that neither the city nor the defendant was a party to the contracts for the bond issues, but nonetheless concluded the defendant had acted in an official capacity because he "was in a position to exert considerable influence over the decisions" of the public financing authority to enter into joint powers agreements and issue the bonds. (*Id.* at p. 1298.)[2]

Similarly, in *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, the defendant was an associate, and later a partner, of a law firm acting as city attorney. Under a written agreement, the city paid the firm a flat monthly amount for general consulting, and agreed to pay for other services, such as litigation, "'on a reasonable legal fee basis, depending upon the type of service rendered.'" (*Id.* at p. 535.) The city asked the defendant to retain an outside law firm to file a claim against several chemical

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[2] The *Gnass* court, however, upheld the trial court's dismissal of the indictment due to the prosecutor's failure to properly instruct the jury.

companies. The defendant negotiated, and the city approved, a written contingency fee agreement with his own firm in association with another firm. The agreement disclosed the total contingency fee, but failed to reveal the associated firm had agreed to pay defendant a referral fee of 35 percent of the total fee. The court recognized the defendant acted as a private attorney in negotiating the contingency fee between his firm and the city, but concluded he acted in an official capacity in choosing the associated firm and negotiating with it, rendering him liable under section 1090. (*Id.* at pp. 541-542.)

In *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278 (*Schaefer*), the city had contracted with an attorney to rehabilitate tax-deeded and "special assessment frozen" properties within the city. (*Id*. at p. 291.) The attorney had purchased many of these properties from the city through third parties at prices far below their fair market value, while assuring the city the price paid was fair. The court ruled the attorney violated a city charter provision similar to the current version of section 1090, which prohibited an "'officer or employee'" of the city from having a financial interest in a transaction with the city. (*Schaefer*, at p. 287, fn. 2.)

The court in *Schaefer* observed that even without the city's conflict of interest charter provision, the attorney's actions would have violated section 1090, even though the statute at that time did not expressly include "employees." (*Schaefer, supra,*140 Cal.App.2d at p. 291.) The court observed: "Statutes prohibiting personal interests of public officers in public contracts are strictly enforced. [Citation.] . . . [¶] A person merely in an advisory position to a city is affected by the conflicts of interest rule. [Citation.] . . . [The retained attorney] was an officer and agent of the city and as such was in a position to advise the city council as to what action should be taken relative to the property involved." (*Ibid*; see also *Terry v. Bender* (1956) 143 Cal.App.2d 198 (*Terry*) [involving the same attorney and scheme].)

The California Attorney General has opined that a financial consultant retained on a temporary basis to provide advice in connection with a bond issue is an

"employee" under section 1090 despite being an independent contractor. (46 Ops.Cal.Atty.Gen. 74 (1965).)[3] Relying in part on *Schaefer* and *Terry*, *supra*, the Attorney General observed: "It seems clear that the Legislature in later amending section 1090 to include 'employees' intended to apply the policy of the conflicts of interest law, as set out in the Schaefer and Terry cases, to independent contractors who perform a public function and to require of those who serve the public temporarily the same fealty expected from permanent officers and employees." (*Id.* at p. 79.)

Consistent with the above authorities, we conclude that an attorney whose official capacity carries the potential to exert "considerable" influence over the contracting decisions of a public agency is an "employee" under section 1090, regardless of whether he or she would be considered an independent contractor under common-law tort principles. (See *Gnass*, *supra*, 101 Cal.App.4th at p. 1298.) Otherwise, the attorney could manipulate the employment relationship to retain "official capacity" influence, yet avoid liability under section 1090. Indeed, the evidence presented here suggests such a situation. McWhirk was CHFA's in-house counsel for six years, becoming its outside counsel before commencing the insurance skimming scheme with Schienle. Nothing in the record demonstrates McWhirk's change in title diminished his influence over the agency.

The authority defendants rely on does not contradict our conclusion. Specifically, defendants misconstrue a footnote in *Gnass* to support the argument section 1090 does not apply to independent contractors. (See *Gnass*, *supra*, 101 Cal.App.4th at p. 1302, fn. 10.) But the opinion merely described the trial court's response to the prosecutor's argument that the lawyer's independent contractor status deprived him of the defense in section 1091.5, subdivision (a)(9), which exempts "[a]n officer or employee" from liability from certain transactions where a full disclosure has

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[3] "Although we are not bound by the Attorney Generals' opinions, they are entitled to 'considerable weight.'" (*Gnass*, *supra*, 101 Cal.App.4th at p. 1304.)

been made.[4] Recognizing the apparent incongruity of asserting section 1090 applied to the defendant, but the similarly-worded section 1091.5 did not, the appellate court remarked: "Of course, if Gnass was not an 'employee' for purposes of section 1091.5, neither was he for purposes of section 1090, in which case the conflict-of-interest statutes would not apply at all. We see no reason why one could be an employee for one and not the other." (*Gnass,* at p. 1302, fn. 10.) The *Gnass* court already had determined the attorney fell within the scope of section 1090. Thus, the court simply questioned the prosecutor's argument that section 1091.5 did not cover the defendant's conduct, but did not suggest independent contractors are exempt from liability under section 1090.

Also unavailing is the defendants' reliance on *Pacific Finance Corp. v. Lynwood* (1931) 114 Cal.App. 509 (*Pacific Finance*). There, the city attempted to prevent payment to the assignee of an engineer retained by the city, arguing that public policy prohibited assignment of a public officer's unearned salary. The court rejected the city's argument that the engineer was a public officer, observing: "There is not a word in the contract between [the engineer] and appellant city which indicates that the parties were endeavoring to insert [the engineer] into the office of city engineer . . . or to create for him any public office. His is not, by virtue of the contract, a public officer." (*Id.* at p. 514-515.)

Pacific Finance does not aid defendants for two reasons. First, the case never addressed when a contracting party could be considered an employee of a public agency. Thus, even if McWhirk was not an "officer" under the holding of *Pacific Finance*, he still could be an "employee" under section 1090. Second, defendants have

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[4] This section provides: "(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following: [¶] . . . [¶] (9) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record."

not demonstrated any parallel between section 1090 and the policy against assignment of a public officer's unearned salary. As we have discussed, conflict of interest provisions "cannot be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose." (*Honig, supra,* 48 Cal.App.4th at p. 314.) Absent some showing that the public policy at issue in *Pacific Finance* has a scope and purpose similar to the conflict of interest statutes, we decline to engraft the court's "public officer" analysis onto section 1090. In sum, we reject defendants' challenge to the trial court's jury instruction that section 1090 may never apply to independent contractors.

2. The Trial Court Did Not Err in Rejecting Defendants' "Remoteness" Instruction

Defendants contend the trial court erred by rejecting their special instruction which limited consideration of section 1090's "financial interest" element to the time when HC and CHFA executed their agreement. Defendants proposed instruction read as follows: "[T]he term 'financial interest' means that Defendants received a direct or indirect benefit from the contract when it came into existence. You are only to focus on the date the alleged illegal contract came into existence unless there is evidence of an express or implied agreement between Defendants related to the contract to provide a direct or indirect benefit at a later point in time."

Section 1090's financial interest requirement is not determined by focusing solely on the moment the illegal contract came into existence. *Honig* is instructive. There, the state superintendent of public education arranged contracts between the Department of Education and a number of school districts to pay the salaries of certain educators employed by a nonprofit entity which also employed the defendant's wife. In determining the defendant's financial interest in the contracts, the court considered the operation of the entire arrangement, including how the defendant funneled money from the Department of Education to the school districts, which then paid the educators

working for the wife's employer. This, in turn, allowed the wife's employer to pay her salary and pay rent to the defendant. On this point, the court noted: "In considering conflicts of interest we cannot focus upon an isolated 'contract' and ignore the transaction as a whole." (*Honig, supra,* 48 Cal.App.4th at p. 320.)

Here, Schienle's execution of the HC contract was only the first step in a larger design. The extent of defendants' financial interest in the contract was manifest in how the entire scheme operated over a six-year period. Limiting the jury to viewing only the events surrounding the execution of the contract would provide them an overly narrow view of the defendants' true interest in the deal.

The cases defendants rely on do not dictate a different approach. For example, in *Thomson, supra*, 38 Cal.3d 633, the Supreme Court recognized that "the policy goals of section 1090 support the rule that public officers 'are denied the right to make contracts in their official capacity with themselves *or to become interested in contracts thus made*.'" (*Id.* at p. 645.) Thus, the court applied section 1090 where a city council member sold property to a developer who dedicated it as a public park under a preexisting agreement between the developer and the city. In upholding the defendant's conviction, the court not only considered the city's contract, but also the manner in which it was ultimately carried out.

Defendants also rely on cases holding that in the absence of tolling (such as fraudulent concealment), the statute of limitations for section 1090 begins to run on the challenged contract's execution. (See *Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 879-880; *Honig, supra,* 48 Cal.App.4th at p. 339; *Smith v. Superior Court* (1994) 31 Cal.App.4th 205, 212.) That the statute of limitations may commence upon a contract's execution, however, does not mean the jury cannot consider the manner in which the contract is carried out to determine the extent of the defendant's financial involvement. Consequently, the trial court properly rejected defendants' remoteness instruction.

3. Defendants Were Not Entitled to an Instruction that Section 1090 Requires a Defendant to Knowingly Posses a Financial Interest

Defendants contend the trial court erred when it refused to instruct the jury that section 1090 requires a defendant to "knowingly" possess a financial interest. We disagree.

Defendants rely on *Honig,* which required a defendant in a criminal case to "knowingly" violate section 1090. The "knowingly" requirement does not arise from section 1090, however, but from section 1097, which makes a public official "who willfully violates" section 1090 guilty of a felony. (See *Honig, supra,* 48 Cal.App.4th at pp. 335-336.) *Honig* recognized that "the term 'willfully,' . . . imports a requirement that 'the person knows what he is doing.'" (*Id.* at p. 334.) The court concluded "knowledge is an implied element of a 'willful' violation of the conflict-of-interest statutes. [Fn. omitted.]" (*Id.* at p. 335.)

Section 1090, however, lacks the element of willfulness specified in section 1097. On this point, *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572 observed: "It is settled law that where a contract is made in violation of section 1090, the public entity involved is entitled to recover any compensation that it has paid under the contract without restoring any of the benefits it has received. [Citations.] The contract is against the express prohibition of the law, and '". . . courts will not entertain any rights growing out of such a contract, or permit a recovery upon quantum meruit or quantum valebat."' [Citations.] This principle applies *without regard to the willfulness of the violation*. 'A person who violates section 1090, regardless of whether the violation is intentional, forfeits any rights or interests flowing from the illegal contract.'" (*Id.* at p. 583, italics added.) Because a civil violation of section 1090 need not be willful, proof of defendants' knowledge is not required, as it was in *Honig.* We conclude the trial court properly denied defendants' instruction request.

E. *Substantial Evidence Supports the $6.7 Million Damage Award*

Defendants contend the evidence does not support the jury's $6,744,602 damage award, and request we reduce it to $142,350.13 as to Schienle and $2,506,286.74 as to McWhirk. Defendants rely on CHFA's trial exhibit 860, which indicated McWhirk personally received $1,119,180.92 from HC, McWhirk's separate business enterprise Stars and Stripes received $1,385,105.82, and Schienle received $142,350.

Defendants argue the damages cannot exceed the amounts they each received. We disagree. "As long as two or more persons agree to perform a wrongful act, the law places civil liability for the resulting damage on *all* of them, regardless of whether they actually commit the tort themselves." (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784.)

Defendants also assert that the jury was misled by the court's damage instruction for section 1090, which provided: "Once a violation of Section 1090 has been established, the public agency is entitled to recover any money or other consideration that it has paid under the contract, without restoring the benefits received under the contract." This instruction is a correct statement of the law. (See *Thomson, supra,* 38 Cal.3d at p. 647 [recognizing that a public "agency is entitled to recover any consideration which it has paid, without restoring the benefits received under the contract"].)

During trial, CHFA's damages expert testified defendants failed to remit mortgage insurance premiums of $6,744,602, before interest. The jury apparently accepted the expert's calculations in determining damages. We perceive no error in the award.

F. *The Trial Court Did Not Err in Granting CHFA's Attorney Fee Motion*

1. The Trial Court Had Jurisdiction to Hear CHFA's Fee Motion

Defendants contend the trial court lacked jurisdiction to grant CHFA's attorney fee motion because it was untimely. We are not persuaded.

California Rules of Court, former rule 870.2(b)(1),[5] provided that attorney fee motions "shall be served and filed within the time for filing a notice of appeal under rules 2 and 3." Former Rule 2(a)[6] provided: "Unless a statute or rule 3 provides otherwise, a notice of appeal must be filed on or before the earliest of: [¶] (1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed; [¶] (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or [¶] (3) 180 days after entry of judgment." Defendants note the clerk mailed a file-stamped copy of the judgment on November 19, 2004, and that CHFA filed its attorney fee motion on January 19, 2005, 61 days later.

California Rules of Court, former rule 3(e)(1),[7] however, provided an extension to the 60-day time period, as follows: "If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is extended until 20 days after the superior court clerk mails notification of the first appeal." Because defendants timely appealed from the judgment, the time for CHFA to file an appeal, and thus a motion for attorney fees, was extended 20 days from the date the clerk mails notification of defendants' appeal. Accordingly, CHFA's fee motion was timely.

Defendants contend, however, that California Rules of Court, former rule 3(e)(1) did not extend the time for CHFA to file a notice of appeal because its heading read "cross-appeal." This argument is specious. There is no qualitative

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[5] Now rule 3.1702(b)(1).

[6] Now rule 8.104(a).

[7] Now rule 8.108(e)(1).

difference between "filing a notice of appeal" from a judgment in former rule 870.2(b)(1)), and "appeal[ing] from the same judgment," employed in former rule 3(e)(1). Former rule 870.2(b)(1) expressly contemplated that the extensions set forth in former rule 3 would apply to attorney fee motions, and defendants have cited no cases which would exclude subpart (e)(1).

Defendants also contend that because CHFA's cross-appeal addressed the trial court's order granting their motion to strike, it was not an "appeal from the same judgment" as defendants' appeal. Thus, defendants argue, CHFA's cross-appeal did not extend the time to file an attorney fee motion. This argument is meritless. California Rules of Court, former rule 870.2(b)(1) required only that a party file an attorney fee motion within the time for filing an appeal; *it did not require an appeal to actually be filed*. Thus, even if CHFA's cross-appeal was not from the judgment (or even a sham, as defendants assert) and did not fall within the extension found in former rule 3(e)(1), the extension nonetheless applied to the attorney fee motion, which was keyed to the time for filing an appeal from the judgment. Consequently, the trial court had jurisdiction to hear CHFA's attorney fee motion.

2. The HC Contract Supports the Attorney Fee Award

Defendants contend that the jury's determination that they violated section 1090 meant that all provisions of the HC contract were unenforceable, including the attorney fee provisions. We disagree.

Civil Code section 1717 makes a unilateral right to attorney fees under a contract reciprocal, thus ensuring the mutuality of remedy. The provision not only creates mutuality in one-sided agreements, but also where one party successfully argues "'the inapplicability, invalidity, unenforceability, or nonexistence of the same contract.'" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 611.) "Because these arguments are inconsistent with a contractual claim for attorney fees under the same agreement, a party

prevailing on any of these bases usually cannot claim attorney fees as a contractual right. If section 1717 did not apply in this situation, the right to attorney fees would be effectively unilateral . . . because only the party seeking to affirm and enforce the agreement could invoke its attorney fee provision. To ensure mutuality of remedy in this situation, it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed." (*Ibid.*)

This principle applies here. HC filed a cross-complaint against CHFA, seeking damages for breach of the HC contract. The agreement contains an attorney fee clause which would have required CHFA to pay HC's reasonable attorney fees if HC had prevailed. Denying CHFA fees simply because it prevailed on its section 1090 claim would eliminate the mutuality Civil Code section 1717 assures. The result is particularly unjust where CHFA was forced to expend the public's funds to recover money effectively stolen by two of its fiduciaries.

Relying on *Bovard v. American Horse Enterprises, Inc*. (1988) 201 Cal.App.3d 832 and *Geffen v. Moss* (1975) 53 Cal.App.3d 215, defendants argue that an attorney fee provision is unenforceable if it is contained in a contract the court declares illegal. The rule in *Bovard* and *Geffen*, however, applies where the contract is unenforceable due to its illegal object. (See *Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, 1081-1082 (*Yuba*).) For example, the contract in *Bovard* called for the manufacture of drug paraphernalia. (*Bovard*, at pp. 837, 839-841.) Similarly, *Geffen* involved a contract to purchase the "goodwill" of a law practice. (*Geffen*, at pp. 225-227.)

Courts refuse to enforce attorney fee provisions in these cases to discourage agreements to achieve illegal goals. As *Yuba* explains: "Where the object of the contract

is illegal, courts generally will not enforce it or lend assistance to a party who seeks to benefit from an illegal act. [Citation.] 'The reason for this refusal is not that the courts are unaware of possible injustice between the parties, and that the defendant may be left in possession of some benefit he should in good conscience turn over to the plaintiff, but that this consideration is outweighed by the importance of deterring illegal conduct. Knowing that they will receive no help from the courts and must trust completely to each other's good faith, the parties are less likely to enter an illegal arrangement in the first place.'" (*Yuba, supra,* 98 Cal.App.4th at p. 1082.)

Here, the object of the contract was for HC to provide CHFA collection and accounting services. Although the contract was void under section 1090, its object was not illegal. Moreover, a denial of attorney fees in the present case would not deter the illegal conduct at issue here, but would have the opposite effect. Courts have allowed an innocent party to claim protection under a contract rendered illegal by statute where doing so would serve the statute's underlying purpose. As *Yuba* observed: "'[W]hen the Legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another, a member of the protected class may maintain an action notwithstanding the fact that he has shared in the illegal transaction.' [Citation.] The protective purpose of the statute is realized by allowing the plaintiff, who is not in pari delicto, to enforce the contract or maintain his action against a defendant within the class primarily to be deterred. [Citations.]" (*Yuba, supra,* 98 Cal.App.4th at pp. 1082-1083.) Following this principle, the *Yuba* court awarded attorney fees to a plaintiff who obtained a ruling that the contract containing the attorney fee provision was void under the Subdivided Lands Act. (*Id.* at p. 1083.) We discern no reason why the same principle should not apply here.

3. Defendants Have Not Demonstrated the Court Improperly Awarded Attorney Fees

Defendants contend the trial court erred in awarding attorney fees which related to matters other than CHFA's breach of contract claim. Defendants argue that the gravamen of CHFA's case was fraud and section 1090 violations, not breach of contract. But defendants fail to recognize that fraud and section 1090 served not only as a basis for affirmative recovery, but also as a defense to HC's cross-complaint for breach of the HC contract. Thus, legal fees incurred in connection with these matters are inseparable from the contract issues. We therefore do not disturb the fee award.

G. *The Trial Court Did Not Err in Awarding Prejudgment Interest*

1. The Trial Court Expressly Authorized CHFA to Bring Its Prejudgment Interest Motion After Entry of Judgment

Defendants contend the trial court erred in awarding $492,817.15 in prejudgment interest on the contract claims against McWhirk because the motion was untimely. We disagree.

The jury awarded CHFA prejudgment interest on its tort claims under Civil Code section 3288 against all defendants. Following the verdict, CHFA also sought prejudgment interest against McWhirk under Civil Code section 3287, which applies to any liquidated damages and unliquidated contract damages. CHFA made its request to the court in a letter accompanying its proposed judgment. The letter, served on opposing counsel, explained the basis for CHFA's interest calculations in its proposed judgment.

At a hearing on defendants' objections, the trial court determined that entry of judgment was premature because the court had yet to rule on CHFA's unfair competition claim. At the court's request, CHFA prepared a judgment which concluded: "The amount of prejudgment interest to be awarded to plaintiff will be determined after entry of judgment." The court entered the judgment on November 19, 2004, and CHFA

filed its motion for prejudgment interest on January 19, 2005. The trial court granted the motion.

Defendants rely on *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 828 (*North Oakland*) in arguing the prejudgment interest motion was untimely. There, the plaintiffs did not request the trial court award prejudgment interest, but simply inserted prejudgment interest in a proposed order granting them costs. The trial court later vacated its prejudgment interest award when it learned the plaintiffs had not orally requested prejudgment interest during the motion to tax costs. The appellate court affirmed, noting that no statute or rule of court established a procedure or time limit for requesting prejudgment interest. (*North Oakland,* at pp. 829-830.) The court also recognized that prejudgment interest is not a cost, but an element of damages and therefore should be included in the judgment. (*Id.* at p. 830.) The court concluded that "requests for prejudgment interest under section 3287 by a successful plaintiff must be made by way of motion prior to entry of judgment, or the request must be made in the form of a motion for new trial no later than the time allowed for filing such a motion." (*Id.* at pp. 830-831.)

We agree the procedure and time frame prescribed in *North Oakland* is appropriate in the absence of a statute or rule of court. Nevertheless, as *North Oakland* recognized, the rule it created does not limit the trial court's power to award costs where justice requires. Indeed, the court in *North Oakland* considered affirming the plaintiffs' prejudgment interest award because no clear procedural guidelines existed. Ultimately, *North Oakland* denied prejudgment interest based on the delay in seeking prejudgment interest and the plaintiffs' "egregious conduct" in simply inserting the interest into a proposed order without formally raising the issue with the court. (*North Oakland, supra,* 65 Cal.App.4th at p. 831.)

The present case is distinguishable from *North Oakland*. Here, CHFA requested prejudgment interest before entry of the judgment. Although CHFA should

have raised the matter by noticed motion, they did bring it to the court's attention in writing. At the hearing on defendants' objections to the proposed order, the trial court correctly required a motion to raise the issue but incorrectly informed CHFA that it should bring the motion *after* judgment had been entered. Because CHFA first requested prejudgment interest in writing before entry of judgment, we must conclude it would have brought a noticed motion before entry of judgment had the trial court not expressly told it to wait. Accordingly, under the circumstances presented we deem the motion as having been made before entry of judgment, and do not disturb the court's prejudgment interest award.

2. The Prejudgment Interest Award on CHFA's Contract Claim Against McWhirk Was Not a Double Recovery

Defendants contend the additional prejudgment interest award of $492,817.15 against McWhirk based on CHFA's contract claims constituted a double recovery in light of the jury's prejudgment interest award of $1,149,903.72 on CHFA's tort claims against all defendants. We disagree.

Prejudgment interest on CHFA's tort claims accrued at the rate of seven percent. (See Cal. Const., art. XV, § 1.) Seven percent of the $6,744,602 damages found by the jury comes to $472,122.14 per year, or approximately $1,293.48 per day. This amount multiplied by 889 days (representing the time between the filing of the complaint on June 14, 2002, through the entry of judgment on November 19, 1984) yields $1,149,903.72, the interest awarded on CHFA's tort claims.

Prejudgment interest on CHFA's contract claims against McWhirk accrued at the statutory rate of 10 percent. (See Civ. Code, § 3289, subd. (b).) Ten percent of the $6,744,602 damages found by the jury equals $674,460.20 per year, or approximately $1,847.83 per day. This amount multiplied by 889 days yields $1,642,720.87. To avoid double counting, this product is reduced by subtracting the interest on the tort claims,

$1,149,903.72, to yield an additional prejudgment interest on the contract claims against McWhirk of $492,817.15. We perceive no error in the prejudgment interest awards.

Because we do not disturb the judgment, we need not consider CHFA's protective cross-appeal.

III

DISPOSITION

The judgment and orders are affirmed. CHFA is entitled to its costs of this appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.